Supreme Court, U.S.
FILED

No. 94-941191 JAN 6 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS, INC., and K.W.B. FARMS,
Petitioners,

v.

UNITED STATES OF AMERICA,

FLORIDA KEYS CITIZEN COALITION, FLORIDA AUDUBON SOCIETY, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION, DEFENDERS OF WILDLIFE, TREASURE COAST ENVIRONMENTAL COALITION and MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and SAM POOLE, its Executive Director, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and VIRGINIA WETHERELL, its Secretary,

CITY OF BELLE GLADE, and CITY OF CLEWISTON, FLORIDA SUGAR CANE LEAGUE, INC. and FLORIDA FRUIT and VEGETABLE ASSOCIATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

ROBERT P. SMITH
Counsel of Record for Petitioners
HOPPING BOYD GREEN & SAMS
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

WILLIAM H. GREEN
GARY P. SAMS
Counsel for Petitioners
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

38

QUESTION PRESENTED

Whether a lawsuit by the United States on an asserted right of action unauthorized by state law, seeking to compel state administrative agencies to adopt and enforce particular state regulations under state law, is a justiciable case or controversy cognizable by a federal court.

STATEMENT CONCERNING THE PARTIES

All parties to the proceedings before the court of appeals are named in the caption.

Petitioners here were intervenor-appellants in the court of appeals, as were the parties last named in the caption. The United States was an appellee in the court of appeals (and cross-appellant on questions not presented to this Court), as were the Florida agencies named here as respondents. The environmental advocacy organizations named here as respondents were intervenor-appellees in the court of appeals, supporting the position of the United States.

The complete style of the case showing the alignment of the parties in the court of appeals is set out in the Appendix at App. A 1a, 2a.

No corporate parent companies or subsidiaries are to be listed by the corporate petitioners pursuant to Rules 14.1(b) and 29.1.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT CONCERNING THE PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
GROUNDS FOR INVOKING THIS COURT'S JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
1. The Flood Control Project	6
2. Florida's SWIM Act	7
3. Administrative Procedure in Florida	11
4. Initiation of suit and the first appeal	13
5. Proceedings on remand	15
6. The second appeal	18
REASONS FOR ALLOWING THE WRIT	20
1. This claim is not justiciable	24
2. The United States has no "standing" in this litigation	27
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Allen v. Wright, 468 U.S. 737 (1984) 27, 29
Blatchford v. Native Village of Noatak, 501 U.S. 775, 111 S. Ct. 2578 (1991) 24, 25
Flast v. Cohen, 392 U.S. 83 (1968) 26
Garcia v. San Antonio Met. Transit Authority, 469 U.S. 528 (1985) 25
Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395 (1991) 24, 28, 29
Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972) 29
Los Angeles v. Lyons, 461 U.S. 95 (1983) 27, 29
New York v. United States, 505 U.S. ——, 112 S. Ct. 2408 (1992) 25
O'Shea v. Littleton, 414 U.S. 488 (1974) 27, 29
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 24
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) .. 21
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 29
United States et al. v. South Florida Water Mgmt. Dist., 922 F.2d 704 (11th Cir.), *cert. den.*, —— U.S. ——, 112 S. Ct. 407 ..... *passim*
United States et al. v. South Florida Water Mgmt. Dist., 28 F.3d 1571 (11th Cir. 1994) ..... *passim*
United States, etc. v. University of New Mexico, 731 F.2d 703 (10th Cir. 1984) 23
United States v. California, 328 F.2d 729 (9th Cir.), *cert. den.*, 379 U.S. 817 (1964) 23
United States v. California, 332 U.S. 19 (1947) 23
United States v. California, 655 F.2d 914 (9th Cir. 1980) 23
United States v. Minnesota, 270 U.S. 181 (1926) 23
United States v. Puerto Rico, 551 F. Supp. 864 (D.C.P.R. 1982), aff'd, 721 F.2d 832 (1st Cir. 1983) 22, 23
West Virginia v. United States, 479 U.S. 305 (1987) 23
Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 24, 29

TABLE OF AUTHORITIES—Continued

	Page
Beckman v. Marshall, 85 So. 2d 552 (Fla. 1956)	13
Capeletti Brothers v. Department of General Serv., 432 So. 2d 1359 (Fla. 1st DCA 1983)	12
Couch Const. Co. v. Department of Transportation, 361 So. 2d 172 (Fla. 1st DCA 1978)	12
Friends of the Everglades, Inc. v. Board of County Comm'rs, 456 So. 2d 904 (Fla. 1st DCA 1984), rev. den., 462 So. 2d 1108 (1985)	12
Gulf Pines Mem. Park v. Oaklawn Mem. Park, 361 Fla. 695 (Fla. 1978)	12
McDonald v. Department of Banking & Finance, 346 So. 2d 569 (Fla. 1st DCA 1977)	11, 12
State ex rel. Department of General Services v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977)	11, 12, 22

CONSTITUTIONS, STATUTES AND RULES

U.S. Const. art. I	29
U.S. Const. art. III	*passim*
U.S. Const. art. IV, § 4	*passim*
U.S. Const. amend. X	*passim*
28 U.S.C. § 1254(1)	2
33 U.S.C. § 1342(l)(1)	20
33 U.S.C. § 1362(14)	20
40 C.F.R. §§ 122.2 and 122.3 (1994)	20
Fla. Stat. § 120.57	11, 12
Fla. Stat. § 120.54(17)	11
Fla. Stat. § 120.68	22
Fla. Stat. § 373.451	9
Fla. Stat. § 373.453(1), (2)	9
Fla. Stat. § 373.457(2)	10
Fla. Stat. § 373.4595(2)(a)1	11
Fla. Stat. § 403.412	12, 13
1991 Fla. Laws ch. 90	15
1994 Fla. Laws ch. 115	26
Fla. Admin. Code 17-4.242(2)	9
Fla. Admin. Code 17-4.244	8
Fla. Admin. Code 17-302.100(10)(c), (d)	9
Fla. Admin. Code 17-302.200(27)	8

TABLE OF AUTHORITIES—Continued

	Page
Fla. Admin. Code 17-302.530(48)	8
Fla. Admin. Code 17-302.600(1)	8
Fla. Admin. Code 17-302.700(9)	8, 9
Fla. Admin. Code 17-302.800(1)	8

OTHER AUTHORITIES

THE COMPREHENSIVE REPORT ON CENTRAL AND SOUTHERN FLORIDA FOR FLOOD CONTROL AND OTHER PURPOSES, House Doc. 643, 80th Cong., 2d Session, May 6, 1948	6
Kennedy, A National Perspective of Administrative Law and the Florida Administrative Procedure Act, 3 Fla. St. U. L. Rev. 65 (1975)	12
THE FEDERALIST No. 39	23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-

WESTERN PALM BEACH COUNTY FARM BUREAU, INC., ROTH FARMS, INC., and K.W.B. FARMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

FLORIDA KEYS CITIZEN COALITION, FLORIDA AUDUBON SOCIETY, FLORIDA WILDLIFE FEDERATION, ENVIRONMENTAL DEFENSE FUND, SIERRA CLUB, NATIONAL WILDLIFE FEDERATION, WILDERNESS SOCIETY, NATIONAL PARKS & CONSERVATION ASSOCIATION, DEFENDERS OF WILDLIFE, TREASURE COAST ENVIRONMENTAL COALITION and MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

SOUTH FLORIDA WATER MANAGEMENT DISTRICT and SAM POOLE, its Executive Director, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION and VIRGINIA WETHERELL, its Secretary,

CITY OF BELLE GLADE, and CITY OF CLEWISTON, FLORIDA SUGAR CANE LEAGUE, INC. and FLORIDA FRUIT and VEGETABLE ASSOCIATION,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Western Palm Beach County Farm Bureau, Inc., Roth Farms, Inc., and K.W.B. Farms petition the Court to review the decision below by writ of certiorari and to vacate that judgment and dismiss the litigation for want of a justiciable Controversy within the federal judicial Power ordained by Art. III of the Constitution.

OPINIONS BELOW

The decision of the court of appeals rendered January 28, 1991, is reported as *United States et al. v. South Florida Water Management Dist. et al.*, 922 F.2d 704 (11th Cir.), cert. den., —— U.S. ——, 112 S.Ct. 407, 116 L.Ed.2d 356 (1991), and is referenced as 922 F.2d at — (1991), App. C 23a et seq. The decision of which review is sought, dated August 23, 1994, is reported at 28 F.3d 1563 (11th Cir. 1994), and is referenced as 28 F.3d at — (1994), App. A 1a et seq.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

The judgment of the court of appeals (App. A) was entered August 23, 1994. A timely motion for rehearing was denied October 11, 1994 (App. B 22a). Jurisdiction to review that judgment is conferred by 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Art III, Sec 2, Constitution of the United States:

   The judicial Power [of the United States] shall extend . . . to Controversies to which the United States shall be a Party; . . . .

2. The Tenth Amendment:

   The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

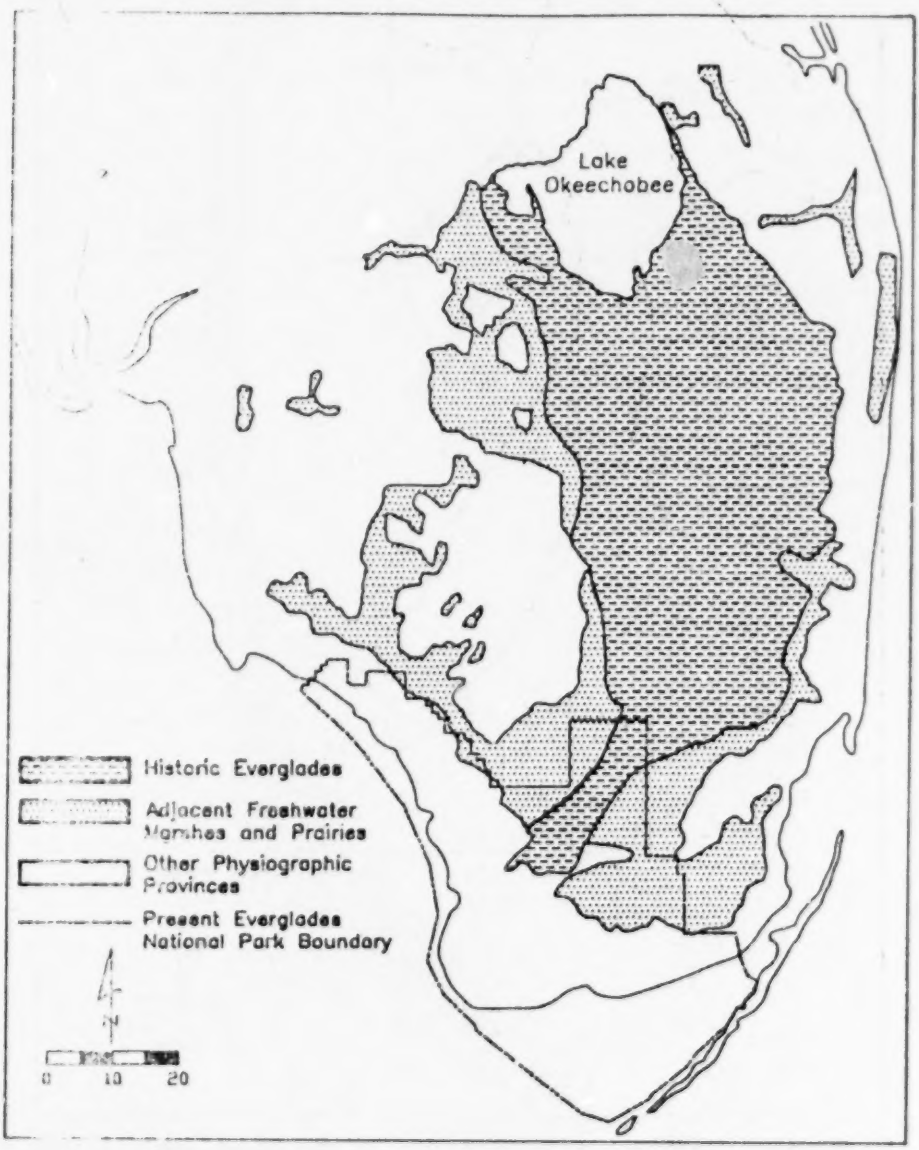
3. The Guarantee Clause, Art IV, Sec 4:

   The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

STATEMENT OF THE CASE

The Everglades that once functioned like this:

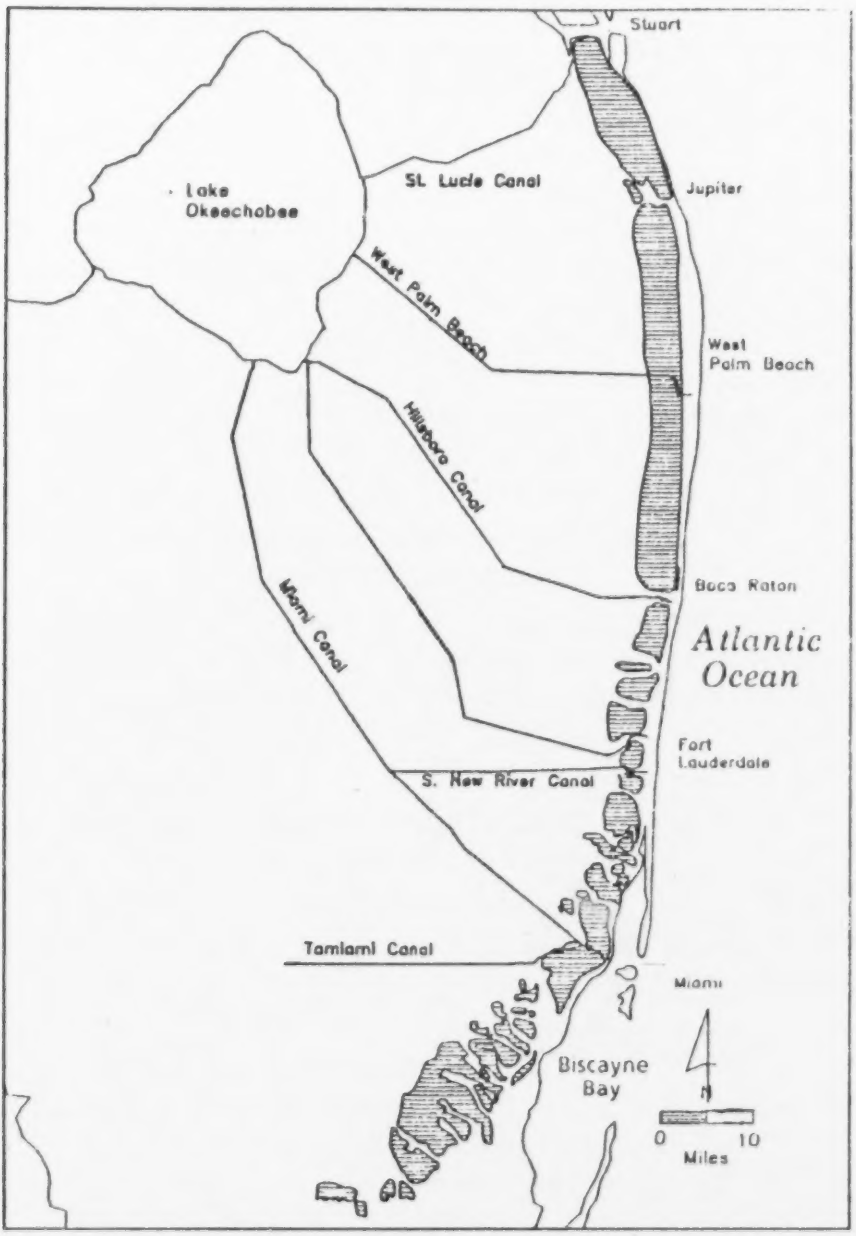
Extent of the Original Everglades Including Adjacent Freshwater Marshes and Prairies. R13-601-Exh. 80 at III-17.



by 1940 had been altered to look like this:

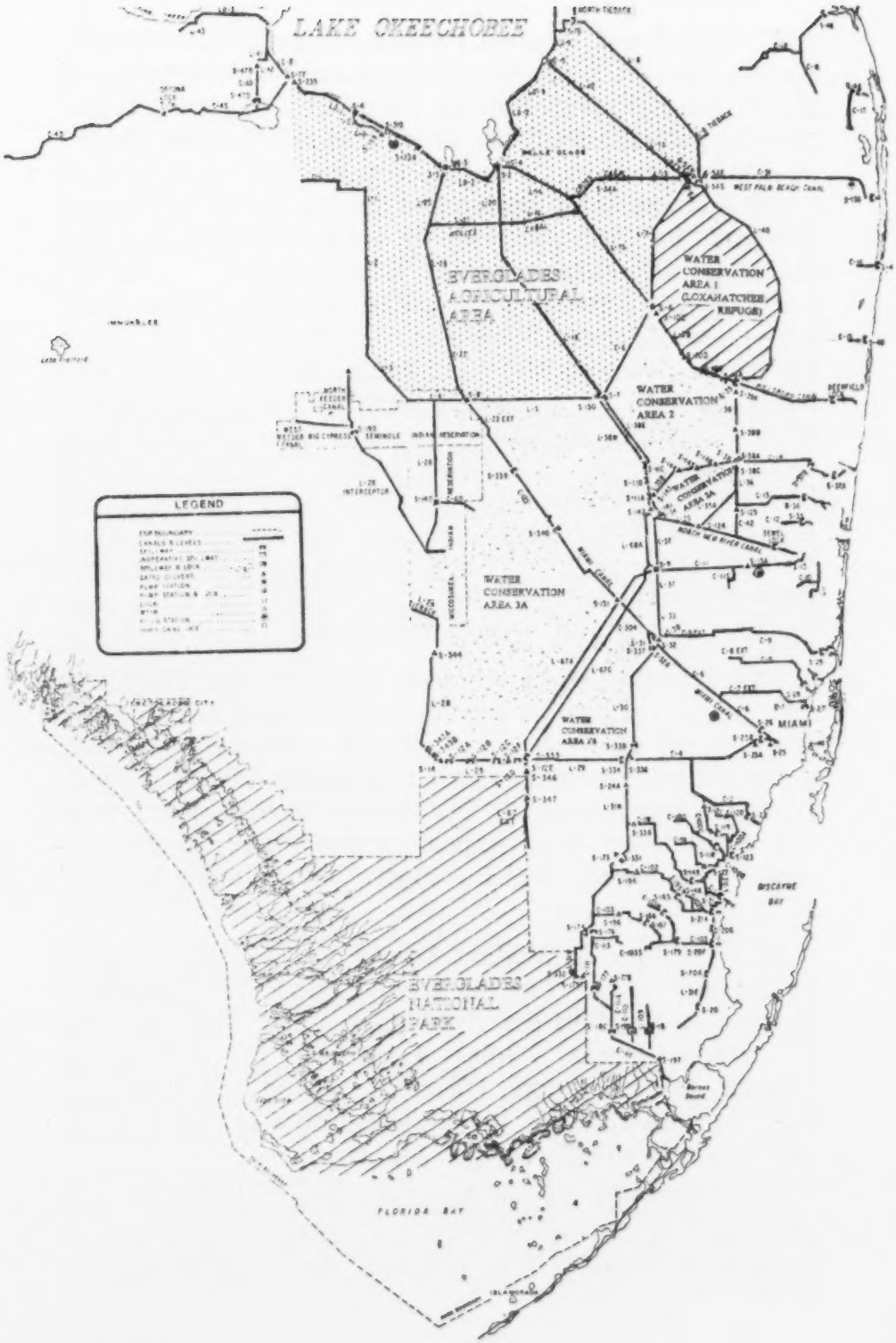
BEST AVAILABLE COPY

Drainage canals built before 1940: gaps in shaded area, the Atlantic Coastal Ridge, indicate pre-canal areas of natural discharge to tidewater. R13-601-Exh. 80 at III-19.



Today the former Everglades is plumbed with 1,500 miles of canals and levees, 125 major water control structures, 18 pumping stations, and other structures. R13-599-Exh. 80:

BEST AVAIL



AILABLE COPY

1. The Flood Control Project. The COMPREHENSIVE REPORT by the Secretary of the Army to the Speaker of the House of Representatives, on which Congress founded the Central and Southern Florida Flood Control Project in 1948, described its "primary purposes" as to protect south Florida from destructive floods, drain the fertile peatlands for farms, and supply water for agriculture and municipal drinking supplies. COMPREHENSIVE REPORT ON CENTRAL AND SOUTHERN FLORIDA FOR FLOOD CONTROL AND OTHER PURPOSES, House Doc. 643, 80th Cong., 2d Session, May 6, 1948, p. 2 ¶ 5. These purposes were to be served by canals, levees, pumps and other structures designed to transfer water to and from three large Water Conservation Areas ("WCAs") located between the Everglades Agricultural Area ("EAA") and destinations to the south and east. "In addition to these primary purposes," the Chief of Engineers reported, the Project would "provide substantial benefits from the preservation of fish and wildlife resources." *Id.* at p. 2 ¶ 5.

The Secretary of the Interior supported the Project as addressing "the critical need for maintaining a reasonably large supply of fresh water so that disastrous fires may be prevented" in the nascent Everglades National Park, *Id.* at vii; but he said, "it is apparent that the characteristics of the waters with respect to their occurrence, movement, and quality, will be appreciably changed . . . ," *Id.* at ix ¶ 3.

The US Fish & Wildlife Service ("USF&WS") added its support to the Project but "decried" the "extensive changes wrought in the Everglades areas" and "the loss of certain unique wildlife habitats." *Id.* ¶ 3 p. ix. Despite its reservation, USF&WS viewed WCA No. 1, the reservoir abutting the agricultural area, as a likely site for a new wildlife refuge. *Id.* at viii.

The USF&WS sought from the State of Florida and on June 8, 1951, was granted a License and Cooperative Agreement (App. L) to establish the Loxahatchee Na-

tional Wildlife Refuge ("the Refuge") in WCA No. 1 for wildlife, fish and game conservation, "subject to the requirements and uses by the Corps of Engineers and the District for flood control and other allied purposes . . . ," and "where such use is not inconsistent with flood control and water retention purposes." App. L ¶¶ 2(a)(2), 3. The Corps in collaboration with USF&WS designed WCA No. 1 with canals inside rather than outside the perimeter levees, assuring that EAA farm drainage could not bypass but would be funneled directly into the Refuge through structure S-5A at its northern end.

The stormwater from EAA agriculture, bearing higher concentrations of nutrients—mainly phosphorous and nitrogen—than had occurred in the natural Everglades, was thus dedicated to the USF&WS water budget for the Refuge sited in WCA No. 1. Everglades National Park ("the Park"), 40 miles distant, also requires water from the EAA, and since 1979 has supported the diversion of increased quantities of EAA water, previously back-pumped to Lake Okeechobee, southward toward the Park. R14-695, Exh. C at 4.

In 1984, the National Park Service, the Corps of Engineers, and South Florida Water Management District signed a "Memorandum of Agreement for the Purpose of Protecting the Quality of Water Entering Everglades National Park," App. M. The Agreement specified numeric quality criteria for 27 elements in water to be delivered to the Park through the Project, including .24 milligrams per liter, or 240 parts per billion, of phosphorous; and provided that "Federal, State, and local water quality criteria which are more stringent than those appended criteria shall continue to apply." App. M 161a, 164a.

2. Florida's SWIM Act. Relevant rules of the Florida Environmental Regulation Commission ("the Commission") define the term "water quality standards" as a matrix of both *restricting* "narrative criteria" and *"moder-*

ating provisions." Rule 17-302.200(27), App. J 142a. Most waters in the state including the Park and Refuge are Class III waters, whose designated use is "Recreation, Propagation and Maintenance of Healthy, Well-Balanced Population of Fish and Wildlife." Rules 17-302.600(1), 302.700(9), App. J 142a, 145a. For those waters the relevant standards are:

Water Quality Standards for Class III Waters

Narrative Criteria	*Moderating Provisions*
Nutrients. In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna. Rule 17-302.530 (48) [formerly 17-302.560(19)], App. J 145a.	*Site Specific Alternative Criteria.* A water body . . . may not meet a particular ambient water quality criterion specified . . . due to . . . natural background conditions or man-induced conditions which cannot be controlled or abated. [T]he Secretary may establish a site specific alternative water quality criterion when an affirmative demonstration is made that an alternative criterion is more appropriate . . . . Rule 17-302.800 (1), App. J 146a. *Mixing Zones.* The Department may allow the water quality adjacent to a point of discharge to be degraded to the extent that only the minimum conditions [no scum, putrescence, toxicity, etc.] apply within a limited, defined region known as the mixing zone. . . . [A] mixing zone may be allowed to provide an opportunity for mixing and thus to reduce the costs of treatment. Rule 17-4.244, App. J 147a.

Moderating provisions are also coupled with restrictive standards in the matrix covering 200 Outstanding Florida Waters ("OFWs") including the Park and Refuge. Those

waters may not be "significantly degrade[d]" from "existing ambient water quality" in the baseline year, 1978-1979, except as "it may be necessary" to permit limited discharges "to enhance public use or to maintain facilities that existed prior to the effective date" of the designation, when "there is no alternative" except at "unreasonably higher cost." Rules 17-302.700(9), 17-4.242(2), App. J 145a, 147a.

The Commission determined that this matrix of restricting and moderating provisions represents an "even-handed and balanced approach to attainment of water quality objectives"; and wrote in the Rules that without the moderating provisions it "would not have adopted" the narrative standards "nor determined that they are attainable as generally applicable water quality standards." Rule 17-302.100(10)(c), (d), App. J 141a, 142a.

Florida's Surface Water Improvement and Management Act of 1987 ("SWIM Act"), § 373.451 et seq., App. H, established for the first time a set of priorities and a method for administering these generic water quality standards. Until the SWIM Act took effect, "the policy determination" by SFWMD in implementing the standards in south Florida "was to focus the program on new development by requiring construction permits." SFWMD "Everglades Status Report" to the Governor, October 4, 1988, R13-601-Exh. 70 p. 1. A "change in the existing land use" would "trigger surface water management requirements." But since "the majority of the agricultural farms in the EAA were in existence at the time" the standards were created, "SWFMD has not required landowners in the EAA to retrofit their stormwater systems." *Id.* at pp. 1, 2.

The SWIM Act required the five state water management districts, including South Florida Water Management District ("SFWMD"), to compose for each water body in turn "recommendations and schedules for bringing all sources into compliance with state standards when not contrary to the public interest." § 373.453(1), (2), Fla.

Stat., App. H 132a, 133a. The Act gave SFWMD three SWIM Plan priorities above all others: to compose SWIM Plans for Lake Okeechobee, for Biscayne Bay, and for the Indian River Lagoon system. § 373.453(1)(c), App. H 132a. The Act committed all authorized funds in the 1987-1988 budget, over $7,000,000, to those priorities. § 373.457(2), App. H 135a. SWIM Plans for water bodies the legislature deemed of lesser priority, including the Park and Refuge, were to be established in due course by SFWMD with oversight by the Department of Environmental Protection ("the Department"). App. H 132a. The Act specified the content of each SWIM Plan, including the "research and feasibility studies which will be performed to determine the particular strategies to restore or protect the water body"; a "schedule for restoration and protection"; and "an estimate of the funding needed to carry out the restoration or protection strategies." § 373.453(2)(g), (i), (j), App. H 133a.

SFWMD advised the Governor's office on October 4, 1988, R13-601-Exh. 70, that it was giving the Everglades SWIM Plan the highest priority available after the three assigned by the legislature. "The District is developing management plans for these areas, with the plans due by 1989." *Id.* at p. 2.

With particular reference to Everglades National Park, the SWIM Act took note that since 1979 the Interim Action Plan ("IAP") had diverted into WCA 3A, north of the Park, EAA water that previously was backpumped directly into Lake Okeechobee. R11-599 Exh. D at II-54. Because the diversion increased the water the Park received, the Park supported the IAP.[1] The SWIM Act

---

[1] US Government memorandum, June 26, 1984, Staff to Superintendent, ENP, "Staff Recommendations on Improved Water Management for Everglades National Park," R14-695, Exh. C at 4, concerning the IAP:

> The plan calls for the pumping of water into the Water Conservation areas to the maximum extent possible, before initi-

instructed SFWMD not to divert those waters to specified areas including the Park so that "water quality standards are violated" or vegetation or wildlife is adversely affected, "unless the receiving waters *will biologically benefit by the diversion.*" § 373.4595(2)(a)1, Fla. Stat., App. H 136a (emph. added).

3. Administrative procedure in Florida. By law governing Florida's government, "every agency action" taken to implement substantive law such as the water quality standards or the SWIM Act is "incipiently a rule or order" under the Administrative Procedure Act, Ch. 120, Fla. Stat.[2] Any agency decision determining someone's substantial interests, other than formal rulemaking which itself is convertible to the adjudicatory mode,[3] will "on appropriate challenge . . . mature into an order impressed with the characteristics of the APA's Section 120.57."[4] This means it will be disciplined by a trial on disputed facts *and policy* before an independent hearing officer of the Division of Administrative Hearings, a body wholly separate from the agency responsible for final agency action.

Florida's § 120.57 trial on policy issues, and the hearing officer's role in formulating agency policy, are perhaps unique among federal and state administrative governance systems:

> While concerning policy matters the hearing officer's recommended order does not carry the authority

---

ation of backpumping to Lake Okeechobee. Estimates made by the South Florida Water Management District state that between 200,000 and 300,000 acre-feet of additional water will be delivered to Conservation Area 3A. Everglades National Park, in efforts to increase quantities of water to the park, supported the adoption of the IAP.

[2] *State ex rel. Dept. of Gen. Serv. v. Willis*, 344 So.2d 580, 584 (Fla. 1st DCA 1977).

[3] Section 120.54(17), Fla. Stat. (1993).

[4] *McDonald v. Dept. of Banking & Finance*, 346 So.2d 569, 577 (Fla. 1st DCA 1977).

> attending its findings of fact, the hearing officer's duty to respond to the evidence in that way cannot fail to promote responsible agency policymaking. The hearing officer's function . . . encourages an agency to fully and skillfully expound its nonrule policies by conventional proof methods; and, in appropriate cases, subjects agency policymakers to the sobering realization [that] their policies lack convincing wisdom, and requires them to cope with the hearing officer's adverse commentary.[5]

Thus all interested persons were assured, in connection with SFWMD's undertaking to establish a SWIM Plan for the Park and Refuge, of an independent trial on the facts and policy issues, and a genuine "opportunity to change the agency's mind"[6] on aspects of the Plan as proposed. "Section 120.57 proceedings are intended to formulate final agency action, not to review action undertaken earlier and preliminarily."[7]

These administrative processes cannot be pre-empted by Florida courts. *State ex rel. Willis v. Dept. of Gen. Serv., supra* fn. 2; *Gulf Pines Mem. Park v. Oaklawn Mem. Park*, 361 Fla. 695 (Fla. 1978).

Florida statute § 403.412, App. K 149a, creates a right of action in the state's Attorney General or "any political subdivision or municipality of the state, or a citizen of the state" to sue a state agency charged with

---

[5] *Id.* at 582-83. "In this respect, perhaps more than in any other 'the Florida legislature has drawn upon the legal thinking and experience of the 1970's, rather than the 1940's when the last administrative procedure acts were conceived.'" *Id.* at 583, quoting Kennedy, *A National Perspective of Administrative Law and the Florida Administrative Procedure Act*, 3 Fla.St.U.L.Rev. 65 (1975).

[6] *Couch Const. Co. v. Dept. of Transp.*, 361 So.2d 172, 176 (Fla. 1st DCA 1978).

[7] *Capeletti Bros. v. Dept. of Gen. Serv.*, 432 So.2d 1359, 1364 (Fla. 1st DCA 1983), quoting *McDonald, supra* fn. 4, 346 So.2d at 584.

enforcing laws or rules for the protection of natural resources, to compel their enforcement. The statute requires the agency be given a 30-day notice of the alleged illegality, and an opportunity to correct it. This right of action is limited to cases of alleged fraud, corruption, "*patent* violations" of law, "or such palpable abuse of authority which may said to be commensurate with illegality," *Friends of the Everglades, Inc. v. Board of County Comm'rs*, 456 So.2d 904, 914 (Fla. 1st DCA 1984) (emph. by the court), rev. den., 462 So.2d 1108 (1985).

4. Initiation of suit and the first appeal. On October 11, 1988, one week after SFWMD reported to the Governor on its Everglades SWIM Plan schedule, the United States filed its complaint "ask[ing] the District Court to partially pre-empt the administrative development of the SWIM Plan by specifying the numeric standards that apply under the SWIM Act." 922 F.2d 704, 708 (11th Cir. 1991). The United States made no claim of having sued by right of § 403.412, Fla. Stat., and gave no 30-day demand to cease IAP diversions of EAA water to the Park. Within a week, eight national environmental organizations, respondents here, sought to intervene as plaintiffs, R1-8, and their motion was granted. R4-136. Motions by petitioners and other farmers to intervene as defendants, R1-37, were opposed by the state agencies and by the United States, and were denied. R5-254.

The original complaint included a distinct common law nuisance claim: that nutrients in EAA water received by the Park and Refuge amounted to a pollution nuisance; but the United States voluntarily dropped that claim by amendment. R1-1; R1-46; 922 F.2d at 711 n. 10 (1991), App. C 35a. By Florida law, nuisance theory does not avail "persons who use their land for purposes which require exceptional freedom from deleterious influences." [8]

The Eleventh Circuit's 1991 decision granting party intervenor status to petitioners and other farmers, described the core claim by the United States thusly:

---

[8] *Beckman v. Marshall*, 85 So.2d 552, 555 (Fla. 1956), quoting *Corpus Juris Secundum*.

- "[T]he United States asks the District Court to translate narrative state water quality standards into numeric limits." 922 F.2d at 707 (1991). The Opinion identified the standards to be "translated" as being two restricting standards relied on by the United States. Neither the United States nor the Eleventh Circuit made reference to the moderating provisions in the same standards matrices. 922 F.2d at 707 (1991), App. C 27a, 28a.

- "If it finds for the United States on Count I and grants the relief requested, the District Court will in effect translate the narrative water quality standards in the SWIM Act into numeric limits. . . . The problem is that the SWIM Act directs the Water District to conduct administrative proceedings towards this same end—translating the Act's narrative standards into specific numeric limits." 922 F.2d at 708 (1991), App. C 28a, 29a.

- "Viewed from a different angle, Count I of the Complaint seeks to move a state administrative task—development of standards for implementing the broad commands of the SWIM Act—to federal court. *If the state is not doing its job and statutory authority supports federal proceedings, this move is legally proper.*" 922 F.2d at 709 n. 7, App. C 30a (emph. added).

The court described the agencies' "job" as follows: "The broad narrative language of the SWIM Act confirms the grant of administrative discretion to define what the Act's standards mean." 922 F.2d at 708 (1991), App. C 29a.

The court described the adjudication sought: "[A]s counsel for the United States stated in oral argument, an order setting maximum concentrations of nutrients is the remedy that the United States seeks." *Id.* Quoting counsel: " '*The only thing that we are concerned with in this lawsuit is a numerical standard for the vegetation in the Park and the Refuge.*' " 922 F.2d at 708 n. 6 (1991) (emph. by the court), App. C 28a.

The court on rehearing refused to consider the farmers' Suggestion and Motion as to Lack of Jurisdiction, stating

it was beyond the scope of the farmers' intervention and that the farmers were adequately represented on that issue by the state agencies, who declined to raise the Art. III issue in the court of appeals. Order, Mar. 22, 1991, App. D 39a, 40a. The court ordered that the district court on remand may "dispose in summary fashion (as we have done here) of any motions that the Farm Interests may file beyond the scope of their right to participate in these proceedings." *Id.*, App. D 40a.

5. Proceedings on remand. On remand, petitioners filed a Suggestion of Lack of Art. III Jurisdiction based on the Tenth Amendment, the Guarantee Clause, federalism and the absence of any statute creating a right of judicial action. R19-979. The Suggestion was summarily stricken. R20-1011. The district court later observed, "Under section 1345, *the mere presence of the United States as a plaintiff in this case is enough* to vest this Court with jurisdiction absent congressional authority clearly indicating otherwise." R22-1081-2 (emph. added).

By the spring of 1991, when the farmers first appeared as intervenor parties in the district court, the state had been responding to discovery on its emerging SWIM Plan for more than two years. On May 21, 1991, when the United States had given notice of taking "more than 90 depositions in the next five months," R16-814-10, Governor Lawton Chiles appeared in court with the defendant agencies to ask for a one year stay of litigation, so that the agencies might complete and adopt the SWIM Plan in expedited Ch. 120 proceedings under new legislation that the Governor had sponsored in an effort to end the litigation.[9] Ch. 91-90, Fla. Laws, § 373.4592, Fla. Stat., App I 139a.

---

[9] The agencies' motion to stay: "The taxpayers of the State of Florida and the United States of America have already borne the burden of having many millions of their tax dollars spent to support this massive internecine governmental litigation. Florida

Responding in open court to the Governor's request, the United States Attorney demanded a "number" stringently limiting nutrients in the Park and Refuge, and a list of the "aggressive enforcement measures" the state would take against the farmers. He demanded also that the state acquire "43 thousand or 35 thousand [acres of farmland], or some number that science can be litigated in this court or agreed upon as adequate," rather than the "17 thousand" then proposed by SFWMD. R40-1248-48, 49. Hearing those demands, Governor Chiles rose in court to announce, *Id.* at 76, 77:

> "I am here and I brought my sword. I want to find out who I can give that sword to."
>
> "We want to surrender."

In the Settlement Agreement filed shortly thereafter, SFWMD and the Department agreed with the United States, subject to the court's approval, to use all the agencies' powers to put a SWIM Plan regulation into effect as specified by the Agreement for the Park and Refuge. App. G 75a, 90a. The Agreement was:

- The moderating provisions in the state water quality standards would be ignored. The farmers will be regulated to meet a phosphorus limit at the Park of 8 to 14 parts per billion and an interim limit at the Refuge of 8 to 22 ppb. App. G 82a, 83a. These numbers compare to 30 ppb in "good-quality rainfall" [10] and 240 ppb in the 1984 Memorandum of Agreement on the Park. Longterm limits would be set later. App. G 83a.

---

taxpayers are also funding the concurrent development of a state administrative remedy in the form of the Everglades SWIM Plan, another extremely large and expensive undertaking." R16-814-10.

[10] Draft SWIM Plan Aug. 1989, R10-598-Exh. 5 p. 7. The Eleventh Circuit (1991) quoted SFWMD as advising the district court, in 1989, that an "even less restrictive standard" of 50 ppb "would entail 'draconian consequences' for the farms using the water." 922 F.2d at 709, App. C 32a.

- 34,700 acres of farmland will initially be taken from the farmers, funded by taxing the remaining farmers under the 1991 legislation, and devoted to Stormwater Treatment Areas; but if "research and monitoring" determines that the interim or longterm limits are not timely met, "then the State Parties will implement additional remedies," App. G 85a, 86a.

- Park, Refuge and Corps officials will constitute a majority of a "Technical Oversight Committee" within SFWMD, which shall direct the agency's "research and monitoring," App. G 94a, 95a, and eventually will determine what the permanent Class III numeric standard shall be. "If the TOC determines Class III total phosphorus concentration levels are lower than the long term total phosphorus concentration levels then the lower levels shall apply." App. G 86a, 108a, "Class III Criteria."

- "In any administrative hearing on the SWIM Plan or permits, the State Parties shall support and defend the SWIM Plan and permits consistent with Appendices A through E." App. G 91a, 92a. "FORCE MAJEURE" excusing noncompliance *pro tanto* includes "natural disasters as well as unavoidable legal barriers or restraints," but "shall not include increased costs of activities covered by this Agreement, whether or not anticipated at the time such activities were initiated." App. G 97a.

The district court approved the Settlement Agreement and entered it as Consent Decree, ordering the agencies to subject the SWIM Plan to Chapter 120 processes and declaring that while the agencies "must propose those measures set forth in the Agreement which are subject to the APA," they are not "required to adopt these measures as final action in the face of conflicting findings of fact or if persuaded that such action goes against the weight of the evidence . . . ." App. G 44a, 50a. The court retained jurisdiction as the agencies had agreed, App. G 72a, 73a:

> Though defendant-intervenors [farmers] would prefer that the Court relinquish its continuing jurisdiction over this case by leaving the ultimate determination of the United States' rights and remedies to the state administrative process, the Court declines to do so. The United States, having the right to be in this Court, has the right to return to this Court if it is not satisfied with its remedies in the administrative process.

6. The second appeal. On appeal, petitioners renewed their jurisdictional challenge, contending that Article III does not encompass " 'litigation to coerce the making of State regulations that a federal judge deems suitable under State law for United States property interests.' " 28 F.2d at 1569, App. A 10a, quoting petitioners' brief. Although the court (and the Department of Justice) in 1991 had acknowledged that the complaint asked the court to supplant the state administrative process in precisely that manner, *see* pp. 14, 15, *supra*, on the second appeal the court chose to focus not on the complaint but on the Settlement Agreement, which the court described as merely "requiring the State agencies to carry out their State statutory duties to enforce the applicable water quality standards in waters diverted to the Park and Refuge." *Ibid.*, App. A 11a.

The court held that the litigation, viewed through the prism of the Settlement Agreement and Consent Decree, "does present a case or controversy":

- "The justiciability of the controversy rests on the government's assertion that the use of its public lands is being destroyed by nutrient-laden water because the State agencies are not fulfilling their legislatively enacted duties. Nor does it intrude, in the circumstances of this case, into areas reserved by the sovereignty of the State." 28 F.3d at 1571, 1572 (1994), App. A 15a.

- "The Park has diverse and complex ecosystems that *require* non-polluted, *low nutrient waters* for their eco-

logical integrity," and "*low nutrient waters* are also *required* in the Refuge to preserve its native habitat." 28 F.3d at 1568, col. 1, App. A 6a (emph. added). "Large quantities of polluted waters have resulted in the destruction of lower forms of aquatic life essential to the preservation of the sensitive ecosystems in the Park and Refuge." 28 F.3d at 1568, App. A 6a. The court made these declarations on disputed facts and policies without benefit of a trial or findings below, and without reference to conditions that the Project had produced at the Park and Refuge in the OFW baseline year of 1979—19 years after the Project was built.

- "[I]t is important to consider what the district court did and what it did not do. This is because the thrust of the Intervenors' argument is that this is simply 'litigation to coerce the making of State regulations that a federal judge deems suitable under State law for United States property interests.' We do not accept this as a correct statement of the issue involved. Rather, as the district court explained: 'Nothing in this Agreement is intended to abrogate the District's and DER's duties to act in accordance with Florida law. Indeed, the Agreement requires the District and DER to fulfill their obligations under existing state law.'" 28 F.3d at 1569 (1994), App. A 10a.

- "The government's amended complaint did not seek, nor does the Consent Decree provide, that the government's role is to force the State to compose or enforce stricter State law regulations. On the contrary, the Agreement commits the State to perform certain remedial measures which are fully authorized by State law." 28 F.3d at 1570 (1994), App. A 10a. "There is no suggestion in the case *sub judice* that the Consent Decree *violates* state law." 28 F.3d at 1570, App. A 12a (emph. by the court).

- The only "standing" required of the United States to maintain litigation of this character is that it "have an

interest in the dispute that is sufficient," *viz.*, the United States " 'simply may decide to litigate to assure the proper implementation of its policies and programs,' " quoting 14 Wright et al. *Federal Practice and Procedure* § 3651 (1985). 28 F.3d at 1571, App. A 14a, 15a.

REASONS FOR ALLOWING THE WRIT

The Eleventh Circuit has impermissibly expanded the federal judicial Power well beyond the limits prescribed by Article III. The result is an unprecedented and constitutionally intolerable federal judicial intrusion into the essential workings of state government. The litigation has no purpose but to make state policy with which to judge the prior conduct of state agencies and supervise their future actions in regulating citizens of the state. This Court should grant certiorari to rectify the invasion of state sovereignty that the Eleventh Circuit has wrongly sanctioned.

Congress exempts from Clean Water Act permit requirements the stormwater runoff and return flows from irrigated agriculture.[11] Florida's regulatory system therefore controls. The Eleventh Circuit (1994) describes this as an action "to enforce" Florida law, having previously (1991) said the complaint demands judgment "translating" selected narrative standards, a discretionary agency function, into practical regulations. The Consent Decree now overreaches even those conceptions, dictating how the agencies shall exercise their discretion for years to come, else resume the litigation to which Governor Chiles dramatically "surrendered" on May 21, 1991. The opinions both (1994) and (1991) create a facade of simplicity by incompletely describing the interactive restricting and moderating standards that together are Florida's water quality standards.

This is not permissible judicial activity under Article III. The Eleventh Circuit would not conceivably so un-

[11] §§ 402(l)(1) and 502(14) of the Clean Water Act, 33 USC §§ 1342(l)(1) and 1362(14); 40 CFR §§ 122.2 and 122.3 (1994).

dermine EPA programs, say, under the Clean Water Act; and no federal court would entertain litigation to force the Treasury Department to adopt a particular interpretation of the tax code. Yet the Constitution protects the residual sovereignties of the states far more explicitly than the Constitution enforces a separation of federal powers. The courts below have simply ignored those constitutional texts.

Surely it is a state's sovereign function to promulgate and interpret state regulatory standards. Even if a state agency defied a legislative directive to promulgate a comprehensive regulatory plan—a hypothetical far removed from the facts of this case—that too would be a matter redressable by the state's own sovereign powers. If the state created a right of judicial action in the United States to compel the adoption of a regulatory plan, or the adoption of a particular regulatory plan, the United States arguably might exercise that right of action in federal court. But where the state has not created such a right of action in *anyone*—and Florida assuredly has not—for a federal court to conduct itself as though it *had been* so empowered is simply an inexplicable affront to the state's sovereignty, and to the plan of the Constitution.

The Eleventh Circuit (1994) describes no organic source for the claimed right of action, though its 1991 decision declared, "if . . . *statutory authority supports federal proceedings,* this move is legally proper." 922 F.2d at 709 n. 7 (1991), App. C 30a. This much is clear: no one has by Florida law a right of action to dictate or influence judicially the performance of discretionary agency action; and Florida's relevant statute, naming those who may sue to enjoin egregious unlawfulness by state agencies, does not remotely "appear" to grant the United States even that right of action.[12] App. K 149a.

---

[12] "[N]or is there a stringent interpretive principle guiding construction of statutes that *appear* to authorize such suits [by the United States against a state]." *Pennsylvania v. Union Gas Co.*, 491 US 1, 11 (1989) (emph. added).

Long before the United States sued in 1988, the Park and Refuge had access to the Florida APA's "impressive arsenal of varied and abundant remedies for agency error." Such remedies might have resulted in agency permit requirements and nutrient limits on EAA discharges. "The proper way for a substantially affected person" to get a dispositive hearing "is simplicity itself—he asks the agency for it." [13] The federal litigators simply ignored those remedies, and instead filed their preemptive litigation just as the Everglades SWIM Planning got underway.

What was commandeered was Florida's chosen method of self-government. The objection to litigation which substitutes a federal judge for that self-government is not a "subject matter" nor an Eleventh Amendment objection. The objection arises from the Tenth Amendment,[14]

---

[13] *State ex rel. Dept. of Gen. Serv. v. Willis*, 344 So.2d 580, 590, 592 (Fla. 1st DCA 1977). The available remedy may be exemplified using SFWMD's report to the Governor on October 4, 1988, that for many years "the policy determination" had been to implement the 1979 water quality standards by construction permitting of new development only. Therefore "SFWMD had not required landowners in the EAA to retrofit their stormwater systems," although "such regulation is an alternative available to the District and possibly the Department." R13-601-Exh. 70. The decision to subsume any "available" regulation into the Everglades SWIM Plan "due in 1989" was, beyond any doubt, a freeform agency decision determining the substantial interests of the Park and Refuge, entitling them on request to a disinterested hearing on disputed facts and policies in the decision to defer. That would have led a final SFWMD order, judicially reviewable *by the distinct legal standards of § 120.68, Fla. Stat.* That review, arguably, might have been conducted by a federal district court. *See United States v. Puerto Rico, infra* fn. 16.

[14] We cannot account for the Eleventh Circuit's (1994) mistaken attribution to petitioners, "The intervenors concede that the Tenth Amendment is not a limitation on Article III in this case . . . ." 28 F.3d at 1570 (1994), App. A 12a. Petitioners' briefs extensively argued from the Tenth Amendment, beginning with this *Summary of the Argument*, FRAP 28(a)(5):

> Article III embodies and expresses, as to the Judicial Branch, the Constitution's assurance to the people, by its structure, the plan of the Convention, the Guarantee Clause and the *Tenth*

the Guarantee Clause, and the federalist structure of the Constitution. The United States has no right against Florida, nor any right of action, to the ends sought and now achieved: not as the federal sovereign,[15] nor by virtue of any text of Constitution or state or federal statute,[16] nor by any theory of common law or identifiable promise in contract.[17]

Amendment, that the residual sovereignty of the states shall be inviolate by the United States, and that this sovereignty shall be defined in reference to the Constitution and laws of the United States. (Emph. added.)

[15] The United States of course has certain rights of action as federal sovereign against any state, e.g., *United States v. California*, 332 US 19, 25 (1947) ("as to who owns, or has paramount rights in and power over several thousand square miles of land under the ocean off the coast of California"). Such actions are *necessities* in the Madisonian sense: "Some such tribunal is clearly essential to prevent an appeal to the sword, and a dissolution of the compact." THE FEDERALIST No. 39.

[16] Again, the Eleventh Circuit (1994) was unaccountably mistaken in attributing to petitioners a claim that any statutory right of action must be by *federal* statute. 28 F.3d at 1571, App. A 14a. A right of action created by state statute may of course be a "Controversy." The California statute in *United States v. California*, 655 F.2d 914, 918 (9th Cir. 1980), expressly created a right of action in federal agencies, among others, to recover fire-fighting costs from responsible persons. That right of action was maintainable in federal courts by virtue of Art III "even if the state attempts to limit the cause of action to suits in state courts only." *See also United States v. Puerto Rico*, 551 F.Supp. 864, 865 (D.C.P.R. 1982), *aff'd*, 721 F.2d 832 (1st Cir. 1983), holding that the United States may exercise in federal district court its right of judicial appeal under Puerto Rico law from Puerto Rico's denial of a permit application.

[17] Cf., e.g., *West Virginia v. United States*, 479 U.S. 305 (1987), a state's obligation to pay pre-judgment interest on its debt for contracted services of the Corps of Engineers; *United States v. Minnesota*, 270 U.S. 181, 192-93 (1926), arising from the state's refusal to pay over sale proceeds of land patents issued in error by United States officers; *United States v. California*, 328 F.2d 729, 732 (9th Cir.), cert. den., 379 U.S. 817 (1964), an ordinary negligence claim for fire damage caused in a national forest by state employees; *United States, etc. v. University of New Mexico*, 731

This Court's decisions renounce and deplore any "Controversy" so conceived, and they prescribe rigorous disciplines for Article III courts to avoid such commandeering of the states as states. The decisions relate to the necessary *justiciability* of federal court claims and the *standing* which federal plaintiffs must demonstrate at every stage of litigation; but these technical doctrines, not mentioned by the Constitution, are informed by considerations of far graver import, which were expressly embodied in the Union of 1787.

1. This claim is not justiciable. The Eleventh Circuit (1994) apparently believed that a question of how a state agency should exercise its discretion, implementing state law, is justiciable by an Article III court if what the plaintiff demands falls within the permissible range of discretion granted to the agency by state legislation. The court emphasized that the Decree did not "require the State to violate the law." 28 F.3d at 1570, App. A 12a. This holding conflicts irreconcilably with the line of decisions stemming from *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (emph. added):

> "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on *how to conform their conduct to state law*. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment."

The federalism principle *underlies* the Eleventh Amendment, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), in "the presupposition of our constitutional structure which it confirms." Thus *Pennhurst* "was an Eleventh Amendment case, but a similar approach is applied in other contexts," *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989): "[The] Eleventh Amendment . . . stand[s] not so much for what it says,

---

F.2d 703 (10th Cir. 1984), ejectment and damages for trespass on federally-protected tribal lands.

but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . ." *See also Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991).

This Court implictly recognized in *Blatchford* that Arctile III embodies and expresses, as to the Judicial Branch, the Constitution's assurance to the people, by its structure, the plan of the convention, the Guarantee Clause, and the Tenth Amendment, that the residual sovereignty of the states remains inviolate. Just as Congress cannot force a state to implement federal legislation, the federal courts cannot dictate the shape or content of local regulations without "infringing upon the core of state sovereignty reserved by the Tenth Amendment." *New York v. United States,* 112 S. Ct. 2408, 2424 (1992).

The Eleventh Circuit (1994) apparently conceives that the Constitution actually *exempts* the Article III judiciary from the prohibition that the judical Power, itself, enforces against Congress: "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." *New York v. United States,* 112 S.Ct. 2408, 2429 (1992). Citizens and states of course have far greater recourse in the representative Congress than they have against "an unelected federal judiciary" undertaking to commandeer a state.[18] It is noteworthy that Congress has expressly withheld federal regulation corresponding to the state regulation here commandeered.

Nevertheless, the Eleventh Circuit (1994) approves the district court's view that "under § 1345 the mere presence of the United States as a plaintiff in this case is enough to vest this Court with jurisdiction absent congressional authority clearly indicating otherwise," R22-1081-2; quoted 28 F.3d at 1569, App. A 8a; and "disagrees" that

---

[18] *Garcia v. San Antonio Met. Transit Auth.*, 469 US 528, 546, 550-51 (1985).

§ 1345 "does nothing to create or define the [Controversy] jurisdiction created by Article III." 28 F.3d at 1569, App. A 9a.

This unarticulated "disagreement" simply ignores the constitutional dimension; it sweeps state sovereignty and the Tenth Amendment under the rug. The Tenth Amendment is designed specifically to safeguard the states and "the people" against depredations of the central government. The Tenth cannot be overridden by a statute which merely assigns certain claims to the federal district courts.

The decision below dispenses with the constitutional limitations on the theory that the district court did not actually render the adjudication sought. This justification is erroneous on four grounds: First, jurisdiction is determined by "the substantive issues the [plaintiff] seeks to have adjudicated," *Flast v. Cohen*, 392 U.S. 83, 100 (1968), and that necessity is not relieved by later events. Second, the Settlement Agreement did not result from federal and state sovereigns "resolv[ing] all of their respective claims against each other." 28 F.3d at 1568, App. A 7a. It resulted, quite literally, from the Governor "surrendering" and handing over "my sword" to the federal power. Third, the district court did not leave SWIM Plan issues for resolution by Florida's APA process; the court expressly retained jurisdiction to resume the litigation "if [the United States] is not satisfied with its remedies in the administrative process." App. F 73a, 74a. And fourth, in the spring of 1994, on the eve of the administrative hearing, the captive Florida agencies successfully prevailed on the legislature to *cancel* that hearing and enact all regulatory elements of the Settlement Agreement. Ch. 94-115, Laws of Fla., § 373.4592, Fla. Stat. (1994 Supp.). That left the farmers without the promised hearing and SFWMD under the continued influence of the federally-dominated Technical Oversight Committee which exerts power by threatening to renew the litigation in the district court.

Ensnarling the state in federal litigation for three years, while the agencies struggled to do their work outside the

courtroom, resembled nothing so much as the nonrepublican form of government practiced by George III, of whom the embattled farmers of that time complained in the Declaration of Independence:

> "He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatigueing them into compliance with his measures."

The Court should take the case to decide whether the Tenth Amendment and the Guarantee Clause constrain the federal sovereign's courts in adjudicating, as well as its Congress in legislating, that the interests of the United States shall dictate state regulatory policy under state law.

2. The United States has no "standing" in this litigation. *Allen v. Wright*, 468 U.S. 737, 760-61 (1984), confirmed in a separation-of-*federal*-powers setting what *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Los Angeles v. Lyons*, 461 U.S. 95 (1983), had settled in the separation-of-federal-*and-state*-powers setting: that "Case-or-controversy considerations . . . obviously shade into those determining whether the complaint states a sound basis for equitable relief." The Court in *Allen* invoked the principle that a government "has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" "[W]hen transported into the Article III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case [not] brought . . . to enforce *specific legal obligations whose violation works a direct harm* . . . ." 468 U.S. at 761 (emph. added).

The Eleventh Circuit (1991) made no pretense that the complaint sought to enforce "specific legal obligations whose violation works a direct harm." The court said, to the contrary, that the United States "asks the District Court to partially preempt the administrative development of the SWIM Plan by specifying the numeric standards that apply under the SWIM Act." Then the court added:

"If *the state is not doing its job* . . . this move is legally proper," 922 F.2d at 709 n. 7, App. C 30a. The court did not describe what might constitute "the state . . . not doing its job," nor the "specific legal obligations" that SFWMD may have neglected. Similarly, when the Eleventh Circuit (1994) described the claim to be, simply, that "the State agencies are not fulfilling their legislatively enacted duties," the court did not attempt to specify those "legislatively enacted duties"—those "specific legal obligations whose violation works a direct harm."

These agencies *had no duty* under Florida law outside the administrative process which the litigation commandeered. In that process, indeed, the State agencies *were* fulfilling their duties. The agencies *had no duty*, ever, "to carry out" only half the standards matrix—the restricting but not the moderating provisions; they *had no duty*, ever, to formulate numeric criteria outside the APA discipline in which the farmers would participate; the agencies *had no duty* in 1987-1988—in fact the SWIM Act mandated other priorities—to specify regulations other than by a SWIM Plan not yet fully conceived; they *had no duty* at the time of suit, October 1988, to have completed a SWIM Plan which the legislature relegated below third priority; they *had no duty* in 1988 to have discontinued the IAP diversions of EAA drainage southward to achieve biological benefits for the Park, as the Park itself had agreed for eight years; and the agencies *had no duty*, ever, to commit themselves to particular interpretations and elaborations of Florida law and policy, outside APA disciplines.

The Eleventh Circuit's failure to identify "specific legal obligations whose violation works a direct harm" cannot be reconciled with the "federalist structure of joint sovereigns," so described in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

This Court's decisions have also clearly demonstrated the judicial safeguards necessary to protect the Constitution (and the other federal branches, and the states) from

unwarranted intrusion by the federal judiciary. A very critical examination of the plaintiff's asserted "standing" at every stage and in light of all circumstances then revealed in the case, is exemplified by *Allen v. Wright,* 468 U.S. at 761 n. 26, protecting functions of other federal branches. The same discipline is exemplified by *O'Shea v. Littleton,* 414 U.S. 488 (1974), protecting sovereign functions of the states. The Ninth Circuit in *Littleton v. Berbling,* 468 F.2d 389 (7th Cir. 1972), had imagined—in much the same fashion as the Eleventh Circuit (1994) —that delicate case management can avoid intrusive adjudication, and with it any constitutional infraction. This Court reversed: "[T]he allegations in this complaint are too insubstantial to warrant federal adjudication of the merits of respondents' claim."

City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983), reached beyond the pleadings to the proofs elaborating plaintiff's claim, even to current facts beyond the record, to conclude that the action required dismissal for want of "standing":

> The individual States may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis. But this is not the role of a federal court absent far more justification than proffered in this case.

The "plain statement" rule also requires that plaintiff's asserted right to be grounded indisputably in the text that allegedly created it. *Gregory v. Ashcroft,* 501 U.S. at 461 (1991):

> This plain statement rule is nothing more than acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

These deep constitutional values are counterbalanced when Congress exercising its Article I powers imposes its will upon affairs otherwise within the states, making its intention " 'clear and manifest.' " *Will v. Michigan Dept. of State Police,* 491 U.S. at 65, quoting *Rice v. Santa*

Fe Elevator Corp., 331 U.S. 218, 230 (1947). Here, Congress has chosen to remain silent.

"Perhaps the principal benefit of the federalist system is a check on abuses of government power. . . . [A] healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory*, 50 U.S. at 458. The decision below unsettles that balance of power. It permits the federal judiciary, at the instance of the federal executive, to enter into, interfere with, and control internal state lawmaking functions. Such activist intervention by the central government is contrary to the genius and violative of the purpose of our federalist system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT P. SMITH
Counsel of Record for Petitioners
HOPPING BOYD GREEN & SAMS
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500

WILLIAM H. GREEN
GARY P. SAMS
Counsel for Petitioners
Post Office Box 6526
Tallahassee, Florida 32314
(904) 222-7500